(9) (8)

Nos. 91-261 and 91-274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTION PRESENTED

The 1959 Congress amended the National Labor Relations Act ("NLRA") to safeguard the validity of master collective bargaining agreements that would bind all contractors and subcontractors on a construction project. In doing so, Congress acted to authorize the continued use of an arrangement, traditional in the construction industry, that developed to meet the industry's special needs for assured labor relations stability, adequate supplies of skilled labor, and fixed labor costs throughout the life of a project as a whole.

The question presented here is whether the NLRA impliedly denies state and local governments, when acting as owners and developers of their property, the right to seek the same kind of labor arrangements and economic advantages in developing their property that the NLRA allows to private property owners.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The majority and dissenting opinions of the *en banc* court of appeals are reported at 935 F.2d 345 and are reprinted at pp. 1a-48a of the Appendix to the *certiorari*

petition in No. 91-274 ("MWRA Pet. App."). The panel opinion of the court of appeals is reported at 135 L.R.R.M. (BNA) 2713. MWRA Pet. App. 49a-71a. The opinion of the district court is not reported. MWRA Pet. App. 72a-83a.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1991. Timely certiorari petitions were filed on August 12 and 13, 1991 and *certiorari* was granted on May 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, Clause 2 of the Constitution, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . .

Sections 8(e) and 8(f) of the National Labor Relations Act, 29 U.S.C. §§ 158(e) and (f), are reproduced at MWRA Pet. App. 143a-144a.

STATEMENT OF THE CASE

A. The Factual Background

1. *The Petitioners*

The Massachusetts Water Resources Authority ("MWRA" or the "Authority") is an independent state authority charged with providing water and sewer services to metropolitan Boston, with constructing and maintaining the facilities required for that purpose, and with financing those activities by current rates or borrowing. Mass. Gen. Laws c. 92 app. §§ 1-1 *et seq.*[1]

[1] Although the Authority is within the Commonwealth's Executive Office of Environmental Affairs for administrative purposes, its operations are controlled not by the Secretary of that Office but by the Authority's own independent board of directors, the majority of whom are chosen or nominated by the communities that use its services and pay its rates.

Kaiser Engineers, Inc. ("Kaiser") is a private construction contractor that manages large, complex construction projects for both public and private owners nationwide.

The Building and Construction Trades Council of the Metropolitan District (the "BCTC" or the "Council") is the principal local association of construction industry labor unions in the metropolitan Boston area. The BCTC participates in the negotiation of collective bargaining agreements on behalf of its affiliated unions.

2. *The District Court Order To Build The Boston Harbor Project*

In September 1985, the United States District Court for the District of Massachusetts ruled that MWRA, as successor to the Metropolitan District Commission, is liable under the Clean Water Act for its predecessor's unlawful discharges of sewage into Boston Harbor. *United States v. Metropolitan District Commission*, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20621 (D. Mass. 1981). The district court then entered detailed remedial orders requiring the construction of a new $6.1 billion sewage treatment system for the metropolitan Boston area and other portions of eastern Massachusetts. MWRA Pet. App. 3a. *See also United States v. Metropolitan District Commission*, 757 F. Supp. 121 (D. Mass.), *aff'd*, 930 F.2d 132 (1st Cir. 1991).

The district court imposed a strict schedule for the project, calling for new construction to begin by 1988 and to be completed by 1999. That court also ordered additional construction work to maintain and rehabilitate existing treatment facilities located on Deer Island in Boston Harbor pending completion of the new project. The district court's numerous detailed orders require that

construction proceed without interruption, making no allowance for delays from such causes as labor disputes. *See* Joint Appendix in Court of Appeals ("C.A.J.A.") at 285-326.

3. *The Nature And Magnitude Of The Project*

The sewage treatment plant now under construction in Boston Harbor is the largest public works project in the history of New England and one of the largest wastewater treatment projects in the history of the nation. At the height of construction, as many as 22 prime contractors and 100 subcontractors will be working simultaneously. As many as 2,500 workers engaged in numerous construction trades will be on the site at that time.

In April 1988, MWRA selected Kaiser as its construction manager. The Authority charged Kaiser with managing and supervising construction activity, including overseeing labor relations on the jobsite. The smooth process of construction depends on an intricate schedule developed by Kaiser for the delivering and storing of materials, the sequencing of construction tasks and the transporting of workers and materials to the site of the construction. *See* C.A.J.A. 327-332.

All of this construction work will take place on a small, crowded site with limited means of access. Deer Island, the location of the new plant, has an area of only 215 acres and is located across a causeway at the end of a long, narrow peninsula extending into Boston Harbor. Because only a single two-lane road winding through residential neighborhoods connects Deer Island to the mainland, use of the site has been conditioned upon transporting half the workers and all construction materials to the site by water. *See* C.A.J.A. 276-281.

At this location, the Authority is building a new primary treatment plant, a new secondary treatment plant and facilities required to bring to these plants wastewater from an area with a population of 2.5 million and to transport from these plants treated effluent and sludge.

C.A.J.A. 274-75. The construction of these facilities will include the digging of a tunnel 26 feet in diameter under the harbor floor to carry treated wastewater 9.5 miles away into the deep waters of Massachusetts Bay and another tunnel to carry sewage 5 miles across Boston Harbor from Nutt Island to Deer Island. *See* MWRA Pet. App. 111a-112a.

In the summer of 1992 alone, contractors and workers on Deer Island have been engaging in such tasks as digging, through deep bedrock, the initial stage of the new 9.5 mile outfall tunnel; running New England's largest concrete batch plant; placing both the concrete produced by that plant and miles of piping into the new primary treatment plant; and continuing the transformation of a 110 foot high glacial drumlin in the center of the Island into a peripheral berm that will shield a neighboring residential community from the treatment plants. The level of construction will increase over the next year. In the midst of this beehive, the Authority and its employees continue to operate Boston's existing sewage treatment plants. *See* MWRA Monthly Compliance Reports, *United States v. Metropolitan District Commission*, No. 85-0489-MA (D. Mass.).

4. *The Nature of the Metropolitan Boston Labor and Contractor Markets*

Union members comprise a large portion of the construction labor force in the Boston area. Unionized contractors perform more than 75 percent of the commercial construction work in the area. More than 30 unions represent workers in the Boston area building and construction trades. *See* C.A.J.A. 328-330.

Because the usual term of the collective bargaining agreements covering those workers is substantially shorter than the projected ten-year life of the Boston Harbor Project, each of those agreements will be up for renegotiation numerous times during the term of the Project. Each renegotiation creates a potential for a strike or other form of lawful concerted action. Under the Na-

tional Labor Relations Act, as amended, 29 U.S.C. §§ 141 *et seq.*, a union engaged in a bargaining dispute may picket in support of its strike, and a strike and picketing by one union potentially could halt the work of a number of contractors.[2]

The nature of the local skilled construction labor force, of the established construction contractors, and of the construction site's geography then, make the Boston Harbor Project particularly vulnerable to delays caused by labor disputes. With only a single road and a single set of piers providing access to Deer Island, separate gates or entrances to the work sites for struck employers and for all other employers are not a practical means for averting delay. Indeed, in November 1988, when two local unions picketed to protest the use of a nonunion subcontractor, all construction activity on Deer Island came to a virtual standstill. MWRA Pet. App. 96a-97a; C.A.J.A. 277-79.

5. *The Boston Harbor Project Labor Agreement*

Because of the length of the Boston Harbor Project, the number and variety of contractors and craft workers required, and the project site's geography, MWRA was particularly concerned about the potential for labor disputes or disruptions that would impede its ability to meet the deadlines imposed by the federal court. The Authority therefore sought Kaiser's recommendations for a labor relations plan that would promote labor harmony over the ten-year life of the Project. Kaiser responded by recommending that the Project be governed by a master labor agreement negotiated prior to the start of the work and covering all contractors and subcontractors. C.A.J.A. 279-81 & 330.

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[2] Other workers may choose to respect the picket line. Even if the other workers initially choose not to discontinue work in support of a strike, they may soon find themselves unable to proceed further with the project because of work that has not been completed by the strikers. Unions engaging in organizational and area standards picketing of nonunion contractors, activities which the NLRA authorizes, present a similar potential for disruption.

In response to those recommendations, the Authority authorized Kaiser to attempt to negotiate such a "project labor agreement" with the BCTC and its national parent association, the Building and Construction Trades Department, AFL-CIO ("BCTD"). The Authority reserved the right to approve the final agreement. C.A.J.A. 281 & 330-331.

In May 1989, Kaiser, the BCTC, and the BCTD concluded negotiation of the Boston Harbor Project Labor Agreement (the "Project Agreement" or the "Agreement"). The Project Agreement reconciles portions of more than thirty separately-negotiated labor-management agreements and establishes the wages, benefits and working conditions for all the construction crafts on the Project for the full duration of the Project. The principal provisions of the Project Agreement include a 10-year no-strike commitment, an expedited procedure for resolving all labor-related disputes, use of union hiring halls to supply skilled union and nonunion craft workers to the Project, recognition of the BCTC as the exclusive bargaining agent of all craft employees on the Project, and a requirement that "the construction work covered by this Agreement be contracted to contractors who agree to execute and be bound by the terms of this Agreement." MRWA Pet. App. 109; *see also* C.A.J.A. 281-82 & 331-32; MWRA Pet. App. 107a-140a (text of Agreement).

In May 1989, the Authority's Board of Directors approved the Project Agreement and determined that the project work should be carried out according to the Agreement's terms. To give effect to this decision, the Authority incorporated Bid Specification 13.1 into its solicitation of bids for work on the Project. That specification contains the following provision:

> [E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the . . . Agreement . . ., and will be

bound by the provisions of that agreement in the same manner as any other provision of the contract. [MWRA Pet. App. 141a-142a.] [3]

Neither the Project Agreement nor Specification 13.1 restricts the bidding to "union" contractors. Rather, the agreement specifies that any qualified bidder is free to compete for a contract, without regard to whether the bidder has any preexisting bargaining relationship with a union, and without regard to the bidder's willingness to sign any other agreement with a union. MWRA Pet. App. 110a, 112a-113a.

Similarly, as this Court has explained, "nonunion employees are not frozen out of the job market by . . . agreements" such as this one. *Woelke & Romero Framing Co. v. NLRB*, 456 U.S. 645, 664 (1982). "Even where construction unions successfully negotiate collective-bargaining agreements that require . . . contractors and subcontractors to obtain their labor from union hiring halls, the union must refer both members and nonmembers to available jobs." *Id.* at 664-65 & n. 18 (*citing* 29 U.S.C. §§ 158(a)(3), 158(b)(2); *Radio Officers v. NLRB*, 347 U.S. 17, 40-42 (1954); *Teamsters v. NLRB*, 365 U.S. 667, 673-677 (1961)).[4]

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[3] Massachusetts competitive bidding laws require the Authority to state its preference for a project labor agreement, like any other contract term, in the form of a bid specification. These laws, which the Authority's Enabling Act explicitly incorporates, require that the competitive bidding process must be carried out by the awarding authority. Mass. Gen. L. c. 30, § 39M; c. 92 App., §§ 1-8(g); c. 149, §§ 44A-44H; *Modern Continental Construction Co. v. Lowell*, 391 Mass. 829, 836, 465 N.E.2d 1173 (1984). These laws also require detailed bid specifications describing the work to be done. Mass. Gen. L. c. 30, § 39M(b); c. 149, § 44B(1); *Datatrol, Inc. v. State Purchasing Agent*, 379 Mass. 679, 400 N.E.2d 1218 (1980).

[4] As an added safeguard to employees, federal law provides that the union security provisions of the agreement may only require employees to undertake certain financial obligations of membership, and may not require membership itself. *See Communications Workers v. Beck*, 487 U.S. 735 (1988); *NLRB v. General Motors*, 373 U.S. 734 (1963).

Moreover, NLRA § 8(f), 29 U.S.C. § 158(f), expressly provides that employees working under a prehire contract may, notwithstanding the agreement, petition the NLRB at any time for an election to decertify their bargaining representative or deauthorize that representative from negotiating or enforcing any union security requirements.

B. The Legal Background

The Project Agreement is an example of a type of contractual arrangement which grew out of longstanding practices in the construction industry that differ in fundamental respects from those in other industries. In recognition of those differences, Congress has crafted special construction industry labor relations rules.

1. Labor Relations Factors in the Construction Industry.

Employment in the construction industry tends to be for shorter terms than in most other industries. Many craft workers work for a particular employer only for the duration of a single project or only for the duration of a particular stage of a project. And many of those workers maintain longer-term relations with their unions —which have traditionally operated job referral systems —than with any particular employer.

As a result, "representation elections in a large segment of the industry are not feasible [means for] demonstrat[ing] majority status due to the short periods of actual employment by specific employers." S. Rep. No. 187, 86th Cong. 1st Sess. 55-56 (1959), *reprinted in* 1 NLRB, *Legislative History of the Labor Management Reporting and Disclosure Act of 1959*, at 451-52 ("Leg. Hist."). *See NLRB v. Local 103, Ironworkers*, 434 U.S. 335, 348-49 (1978).

From the employer perspective, delaying the establishment of collective bargaining relationships until after a formal demonstration of majority support (if one can be had) is a matter of serious moment because most work is allocated through the letting of bids. That being so, prehire collective bargaining is often needed so that "labor costs [can be determined] before making the estimate upon which [a contractor's] bid will be based." H.R. Rep. No. 741, 86th Cong., 1st Sess. 19 (1959), *reprinted in* 1 Leg. Hist. 777. In addition, employers often need to deal with the relevant union referral services prior to hiring in order to be able to obtain "a supply of skilled craftsmen ready for quick referral." *Id.*

A second difference between construction and most other industries is that construction sites involve complex contracting and subcontracting arrangements that result in employees of different employers working closely together in interdependent relationships. These arrangements create a "close community of interest" between "the employees of various subcontractors" on a site, as "the wages and working conditions of one set of employees may affect others." *Woelke & Romero*, 456 U.S. at 661-662. These jobsite conditions also particularly present "the possibility of jobsite friction" as union-represented workers and nonunion workers interact. *Id.* at 661.

To address these special industry characteristics, beginning long before enactment of the NLRA, construction unions and employers made a practice of entering into prehire agreements.[5] These collective bargaining

[5] *Hearings before the Subcommittee on Labor and Labor-Management Relations of the Sen. Comm. on Labor and Public Welfare: on S. 1973, a Bill To Amend the National Labor Relations Act, as amended with reference to the Building and Construction Industry and for Other Purposes*, 82d Cong., 1st Sess. 48 (1951) (the "*Hearings*") (Testimony of William E. Maloney, Vice Pres., Building and Construction Trades Dep't, Pres., Operating Engineers, A.F. of L.).

agreements—which establish wage rates and other terms of employment before employees are hired for particular projects—enable contractors to determine labor costs prior to bidding on work and assure that sufficient skilled labor will be available. Unions and employers also commonly entered into "broad subcontracting agreements," which limit the employers who could perform work on a construtcion site, for example, to union signatory employers or to employers who will adhere to a master labor agreement. *See Woelke & Romero*, 456 U.S. at 659.

2. *The Construction Industry Amendments to the NLRA*

As passed in 1935, the NLRA made no provision for prehire agreements. But for a decade this had no effect on established practices because the National Labor Relations Board (the "NLRB") did not exercise jurisdiction over the construction industry. *See* S. Rep. No. 1509, 82d Cong., 2d Sess. 4 (1952) (citing *In re Brown & Root, Inc.*, 51 NLRB 820 (1943)); S. Rep. No. 187, *supra*, at 27-29, *reprinted in* 1 Leg. Hist. 423-25.

After the 1947 Taft-Hartley amendments, however, the Board did assert jurisdiction over the industry. *See Ozark Dam Constructors*, 77 NLRB 1136 (1948); *Watson's Specialty Store*, 80 NLRB 533 (1948). As a consequence, the NLRB invalidated the union recognition clauses of construction industry prehire agreements on the theory that the unions had not demonstrated majority support in an appropriate bargaining unit before obtaining recognition. *See* S. Rep. No. 1509, *supra*, at 4-5.

The ensuing dislocation in construction industry collective bargaining led both unions and employers in the industry to seek legislation validating traditional collective bargaining patterns. Between 1951 and 1958, such legislation was repeatedly introduced and was the subject

of extensive hearings, although no legislation was enacted.[6]

Finally, in 1959, Congress enacted provisions amending the NLRA to permit continuation of customary labor relations practices in the construction industry. Section 8(f) authorizes construction industry employers to enter into prehire agreements, under which the employer recognizes unions as the representatives of work forces the

[6] In 1951 Senator Taft introduced S. 1973, 82nd Cong., 2d Sess., which was the subject of detailed hearings. *See* 97 Cong. Rec. 9675 (1951); *Hearings, supra*. The bill was unanimously reported by the Senate Labor Committee, and was passed by the Senate by voice vote, without debate. *See* S. Rep. No. 1509, *supra*; 98 Cong. Rec. 5028-29 (1952). However, before action by the House of Representatives, the Eighty-Second Congress adjourned.

Senator Taft introduced a bill to the same effect, S. 656, 83rd Cong., 1st Sess., in 1953, and Senator Smith, Chairman of the Senate Labor Committee, introduced a similar bill in 1954, S. 2650, 83rd Cong., 2d Sess., embodying a proposal of the Eisenhower Administration. *See generally Hearings before the Senate Committee on Labor and Public Welfare on Proposed Revisions of the Labor-Management Relations Act of 1947*, 83rd Cong., 2d Sess. (1954). Although the Smith bill was favorably reported by the Senate Labor Committee, *see* S. Rep. No. 1211, 83rd Cong. 2d Sess. (1954), it died on the Senate floor as a result of efforts to offer amendments relating to other NLRA issues. *See* 100 Cong. Rec. 5827, 6193 (1954).

Efforts in 1958 to amend the NLRA more comprehensively included proposals to validate prehire contracting in the construction industry. *See, e.g.*, S. 3098, S. 3738, 85th Cong., 2d Sess. (1958). Extensive hearings were again held. *See Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on Union Financial and Administrative Practices and Procedures*, 85th Cong., 2d Sess. (1958). And the Senate Labor Committee reported out a bill, S. 3974, which, with respect to prehire contracting, followed the approaches of the 1951 Taft bill and the 1954 Smith bill. 104 Cong. Rec. 11472 (Sen. Kennedy) (1958). Although it passed the Senate by a vote of 88-1, *id.* at 11486-87, the bill died in the House.

employer has not yet hired and agrees to use union operated referral systems for hiring. 29 U.S.C. § 158(f).[7]

At the same time, Congress was considering proposals to prohibit "hot cargo agreements," in which an employer agrees with a union to cease doing business with third parties. Applied to the construction industry, those proposals would have called into question the validity of the traditional industry "contracting and subcontracting" clauses. That being so, when Congress enacted § 8(e), a proviso was appended to exclude from its prohibition "an[y] agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction . . . ." 29 U.S.C. § 158(e).

3. *NLRA §§ 8(e) & 8(f) and Project Labor Agreements*

Taken together, NLRA §§ 8(e) and 8(f) safeguard the validity of project labor agreements which require all contractors and subcontractors who work on a project to agree in advance to abide by a master collective bargaining agreement for all work done on the project. *See Jim McNeff v. Todd*, 461 U.S. 260, 270 & n.9 (1983); *Woelke & Romero*, 456 U.S. at 659-660, 663.

These project agreements incorporate prehire and subcontracting provisions in a manner adapted to large, lengthy, and complex projects. A leading treatise describes this kind of arrangement as follows:

> *Project agreements*: For large projects involving a considerable volume of construction at a single site (or interrelated group of sites) over a period of years, a special agreement will sometimes be nego-

[7] NLRA § 8(f) "is substantially the same as [the] bill introduced in 1951 by Senator Taft." 2 Leg. Hist. 1070 (statement of Sen. Kennedy, the principal sponsor of the bill). And its purpose is "to accommodate the special circumstances of the construction industry." *NLRB v. Local 103, Ironworkers*, 434 U.S. at 349.

> tiated. It may involve the owner of the project as well as his contractors, or it may be sought by the contractor at the owner's insistence. These agreements normally attempt to guarantee the progress of the work without interruption by strikes and to establish special mechanisms for dispute settlement; sometimes they provide means for determining wages and conditions at the projects. While project agreements may be negotiated independently at the national level, at other times they are negotiated with the full cooperation of local parties. [D. Q. Mills, *Industrial Relations and Manpower in Construction* 40 (1972).]

The United States Department of Labor has explained how the economic concerns of owners and contractors on large projects prompted the development of project labor agreements:

> [T]he project agreement developed as a response to problems peculiar to the construction industry. The typical local agreement seldom meets the needs of massive projects such as the construction of the St. Lawrence Seaway or the Alaska Pipe Line, which last for several years, pose special problems of manning and work rules, and involve huge sums of money, a consortium of several contractors, and a great deal of public interest and often public funds. Contractors on such projects, and their eventual owners, want continuity of production, more favorable treatment of costs such as travel and overtime pay than local agreements typically provide, uniform shift and other conditions for all trades and the help of national union officials experienced in securing manpower and administering agreements on large projects . . . . For contractors and owners, one of the chief attractions of such agreements has been their recent inclusion of a clause promising no strikes for the duration of the project. [U.S. Department of Labor, Labor Management Services Administration, *The Bargaining Structure in Construction: Problems and Prospects*, at 14 (1980) ("*Labor Department Study*").]

Recently, the NLRB General Counsel described and upheld against an NLRA challenge a private-sector project labor agreement negotiated by a project manager, at the insistence of a private project owner. *See Morrison-Knudsen*, 13 Advice Mem. Rep. ¶ 23,061 (NLRB-GC 1986) (reprinted as Appendix F of the Appendix to the *certiorari* petition in No. 91-261 ("BCTC Pet. App."), at 97a-102a).[8]

C. The Prior Proceedings

In March 1990, a contractors' association, other than the respondent association, filed a charge with the NLRB contending that the Project Labor Agreement violates the NLRA. The NLRB General Counsel refused to issue a complaint, finding the Agreement lawful under NLRA § 8(e)'s construction industry proviso and under § 8(f). *See Building & Trades Council*, NLRB Case No. 1-CE-71 (NLRB-GC June 25, 1990) (NLRB Division of Advice Memorandum on the Project Agreement) (reprinted as Appendix D at BCTC Pet. App. 83a-88a).[9]

Also in March 1990, the Associated Builders and Contractors of Massachusetts/Rhode Island (an association of contractors who normally perform work on a nonunion basis), as well as 6 of its affiliates (collectively "ABC" or

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[8] In *Morrison-Knudsen*, Saturn Corporation had hired Morrison-Knudsen to serve as project manager for the construction of an automobile plant. At Saturn's behest, the project manager entered into a project labor agreement with BCTD and a number of national and local construction unions. The agreement reserved to Saturn the right to select all contractors, and required that all subsequently selected contractors use union-referred and union-represented employees and abide by all other aspects of the agreement with respect to employment terms. BCTC Pet. App. 97a-102a.

[9] The court below agreed. *See* MWRA Pet. App. 24a ("It is apparent . . . that under the exceptions established by Sections 8(e) and (f) of the Act, the Master Labor Agreement between the Trades Council and Kaiser is a valid labor contract.") (Citing *Jim McNeff*, 461 U.S. at 265-66).

the "ABC contractors"), brought this suit in the United States District Court for the District of Massachusetts, seeking to enjoin Specification 13.1 and challenging the lawfulness of the bid specification and the Project Agreement on a variety of grounds including NLRA preemption. On April 11, 1990, the district court issued a memorandum and order which rejected each of the ABC contractors' various theories, including NLRA preemption, and denied the injunction. *See* MWRA Pet. App. 72a-83a.

In denying the injunction, the district court found that MWRA "was concerned that because of the scale of the project and the number of different craft skills involved, the project was vulnerable to numerous delays, thus placing the court-ordered schedule in jeopardy and subjecting it to the contempt orders of [the] Court." MWRA Pet. App. 74a. That court further found as follows:

> The purpose [of the Project Agreement] was to achieve jobsite labor harmony in order to maintain the court-ordered schedule and avoid the risk of substantial fines for non-compliance. In the absence of such an agreement, legitimate labor disagreements and demonstrations would lead to delays in construction, resulting in increased costs to the MWRA. [*Id.* at 75a-76a.]

A panel of the United States Court of Appeals for the First Circuit (Torruella, Campbell and Re) reversed the decision of the district court and directed entry of a preliminary injunction restraining the use of Specification 13.1. The panel only reached the claim that the Authority's bid specification is preempted by the NLRA, deciding this issue in favor of the ABC. MWRA Pet. App. 49a-71a.

After the district court entered the prescribed injunction on remand, the court of appeals granted rehearing *en banc* on the petition of the BCTC. MWRA Pet. App. 84a-85a, 86a. The *en banc* court, divided 3-2, again found

the bid specification preempted by the NLRA and remanded the action to the district court. *See* MWRA Pet. App. 1a-48a. The majority opinion below held preempted the Authority's requirement that its contractors agree to the Project Agreement, as a "*direct*" state "interference into the collective bargaining process." MWRA Pet. App. 30a. (emphasis in original). The majority based that holding on the premise that "Congress occupied the field" in passing the NLRA, prohibiting virtually all state involvement in private sector labor relations. MWRA Pet. App. 24a; *see also* MWRA Pet. App. 10a-11a and 14a n.13.

In dissent, Chief Judge Breyer—now joined by Circuit Judge Campbell—argued that the NLRA presents no impediment to the Authority's bid specification. Specifically, the dissent concluded that the NLRA does not preempt the state from seeking to serve its "economic self-interest as a purchaser" of construction services in the same manner that the NLRA permits similarly situated private purchasers of such services. MWRA Pet. App. 45a. The dissent went on to explain:

> The NLRA does not contain any language that *explicitly* forbids a state, acting like a general construction contractor, from entering into a prehire agreement. Rather, the majority believes that the Act *implicitly* forbids it from doing so, *i.e.*, that the Act implicitly removed, or preempted, a state's power to act as the MWRA has acted here . . . . We do not see how permitting a state agency, when acting like a general contractor, to make labor agreements just like those that private general contractors make, could "conflict with" the NLRA, "frustrate" the NLRA "scheme", or otherwise interfere with the regulatory system that the NLRA creates. [MWRA Pet. App. 32a (emphasis in original).]

The BCTC and the Authority filed Petitions for *Certiorari* on August 12 and 13, 1991. On May 18, 1992, this Court granted the petitions and consolidated the cases for argument.

SUMMARY OF ARGUMENT

The decision of the court of appeals is startling in its illogic.

In response to economic forces particular to the industry, construction employers and workers, encouraged by project owners—public and private alike—have developed a unique pattern of labor relations. The industry practices have traditionally included collective bargaining agreements covering employees who had not yet been hired and binding employers to whom work had not yet been contracted. In 1959, Congress amended the NLRA to safeguard those practices and, thus, to give continued free rein to the economic forces that had shaped them.

MWRA, as owner and developer of metropolitan Boston's new sewage treatment facilities, determined to have its facilities constructed according to a labor relations arrangement that Congress expressly made lawful in the 1959 amendments. Its decision, identical to the decisions that public and private owners of construction projects have been making for decades, is an example of the very economic forces Congress intended to leave unrestricted. *See* pp. 24-26, *infra*.

Yet, perversely, the court of appeals found the Authority's decision preempted as an interference with Congress' intended play of economic forces.

In reaching a result that—in the name of congressional intent—so manifestly frustrates the intent of Congress, the court of appeals veered from error to mistake. At the outset, the court below failed to heed this Court's repeated counsel that preemption is not to be lightly inferred. Rather, the majority apparently proceeded on the mistaken assumption that congressional action is presumed to oust state authority. Without benefit of any statement by Congress that it intended to reach this result, the court of appeals adopted a *per se* rule that—even when states act in a purely proprietary capacity for purely proprietary

reasons in the same manner as a private proprietor—the states are foreclosed from action that directly affects collective bargaining by others. MWRA Pet. App. 30a.

Neither the structure, the words, nor the history of the NLRA provide any express or implied basis for the conclusion that Congress intended to enact the rule the court of appeals imposed. The Act does not specify the extent of its intended preemptive effect. Rather, a congressional intent to preempt must be implied from the overall structure and particular substantive provisions of the Act. The indication from those sources is that Congress did not intend to restrict the states as would the court of appeals. *See* pp. 24-33, *infra*.

Read as a whole, with particular attention to those of its provisions that distinguish the states from private parties, the NLRA embodies an intent that, when the states act as persons engaged in proprietary conduct for proprietary reasons, they should have, if anything, more freedom than private parties in matters affecting labor relations, not less. *See* pp. 26-30, *infra*.

Not surprisingly, this Court's prior decisions do not support the court of appeals' decision. The court below misread those decisions, just as it misconstrued the Act. That court failed to appreciate the importance of the fact that the precedents it cited arose in regulatory rather than truly proprietary contexts. And it is manifest that the rationale for those decisions applies only in their regulatory context. *See* pp. 33-36, *infra*.

In the end, the effect of the court of appeals' decision is as ironic as it is perverse. The law of the United States, a federal court decided, requires the Authority to take extraordinary steps to carry out, without delay, a massive cleanup of Boston Harbor, on pain of large fines. To obey the law, to avert added costs and delays, and to avoid the fines, the Authority made a purchasing decision that provides for a labor relations arrangement that is common on private construction sites and that Congress

amended the NLRA to permit. Now, unless the judgment below is reversed, the choice to proceed in that way is forbidden to the Authority.

ARGUMENT

MWRA'S BID SPECIFICATION IS LAWFUL UNDER THE NATIONAL LABOR RELATIONS ACT AND IS CONSISTENT WITH THE NATIONAL LABOR POLICY

MWRA's determination that a project labor agreement would govern labor relations on its massive Boston Harbor Project—embodied in its Bid Specification 13.1—violates no law of the United States. On the contrary, agreements like the Project Agreement are standard in the construction industry, and are explicitly provided for in the National Labor Relations Act. Indeed, the considerations that led the Authority to conclude that a project labor agreement should govern on the Boston Harbor Project were the very considerations that led Congress to safeguard such agreements through NLRA § 8(f) and the proviso to § 8(e).

The court below concluded that the NLRA forecloses public owner-developers from availing themselves, if they choose, of the very means of effectuating their proprietary interests that Congress has safeguarded for private owner-developers. That conclusion is based on a mistaken understanding of preemption principles generally, and of this Court's precedents regarding labor law preemption in particular.

A. General Principles of Preemption Analysis

The intent of Congress is the "ultimate touchstone" in any preemption analysis. *Cipollone v. Liggett Group, Inc.*, —— U.S. ——, 60 L.W. 4703, 4706 (June 24, 1992). Moreover, since the NLRA contains no express preemption provision, familiar principles of preemption law provide that the Authority's bid specification should not be found to be preempted "unless it conflicts with federal law or

would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747-48 (1985).

This Court's longstanding reluctance to infer that federal law preempts state authority, *see Cippolone*, 60 L.W. at 4706; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), is based, in part, on constitutional principle and, in part on empirical reality. Because federal preemption involves a restriction of state power, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.". *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Moreover, as this Court has recently observed, Congress commonly manifests respect for state authority by exercising its Commerce Clause powers in a way that exempts state proprietary action from general comemrcial regulation or that grants the states added compliance leeway. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 553-54 & n.17 (1985) (listing examples, including the NLRA).[10]

Those considerations are of particular significance in this case, where the court below significantly expanded the scope of labor law preemption. While this Court has previously established that Congress intended the NLRA to preempt state *regulation* of private industry in a number of different respects, the Court has never found in the NLRA an intent to impose a limitation on a state's management of its own property when the state pursues its purely proprietary interests, and where analogous private conduct would be permitted. *Cf. Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980) ("[S]tate proprietary activities

[10] Indeed, inclusion of the states within the coverage of such legislation often comes only after heated congressional debate. *See* Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, pp. 1102-75.

may be, and often are, burdened with the same restrictions imposed on private market participants. Even-handedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints.").

B. MWRA's Bid Specification Is Not Preempted By The NLRA

1. *General Principles Of Labor Law Preemption*

This "Court has articulated two distinct NLRA pre-emption principles"—the "*Garmon* preemption principle" [11] and the "*Machinists* preemption principle" [12]—each corresponding to a different set of federal policy concerns embodied in the NLRA with which state actions might conflict. *Metropolitan Life Ins. Co.*, 471 U.S. at 748.

The first of those principles—*Garmon* preemption—bans state actions to the extent those actions conflict with either the regulatory judgments embodied in NLRA §§ 7 and 8 or the related jurisdictional judgments made by Congress in "creating an administrative agency [the NLRB] in charge of creating detailed rules to implement the Act, rather than having the Act enforced and interpreted by the state or federal courts." *Metropolitan Life Ins. Co.*, 471 U.S. at 748 & n.26.

The ABC contractors have put their emphasis on the second NLRA preemption principle: *Machinists* preemption. It is *Machinists* preemption—the ABC contractors contend and the court of appeals concluded—that invalidates the MWRA's procurement decision.[13]

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[11] *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

[12] *See Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

[13] Although the ABC contractors have relied all but exclusively on the *Machinists* doctrine in arguing that MWRA's actions are preempted by the NLRA, the majority below did, at various points, state that the Authority's actions "implicat[e]" the *Garmon* pre-

This Court has explained that the *Machinists*' ruling is designed "to govern pre-emption questions that ar[i]se concerning activity that [is] neither arguably protected . . . nor arguably prohibited" by the NLRA's specific terms. *Metropolitan Life Ins. Co.*, 471 U.S. at 749. *Machinists* rests on the understanding that Congress intended certain labor relations activities, which the Act neither protects nor prohibits in specific terms, "to be unregulated," so that such activities would "be controlled [only] by the free play of economic forces." *Machinists*, 427 U.S. at 140. A *Machinists* case, in other words, turns on whether a challenged state action constitutes an unenvisioned state interference with Congress' intended "free play of economic forces."

In contrast to most preemption analyses, *Machinists* analysis requires the courts to infer Congress' intent without guidance from specific statutory prohibitions or protections regarding the precise conduct at issue. The courts must therefore "determine [Congress' intended] impact on state law [from] the wider contours of federal labor policy," drawing "implicat[ions from] the structure of the Act itself." *Metropolitan Life Ins. Co.*, 471 U.S. at 749, 753.

In examining these "contours of federal labor policy" this Court has identified two fundamental underpinnings of *Machinists* analysis. *First*, Congress did *not* intend in the NLRA to create a regime in which labor relations in the private sector are wholly insulated from all state actions and policies. *See Metropolitan Life Ins. Co.*, 471 U.S. at 757. *Second*, the Court has emphasized that "[a]n appreciation of the State's interest" in the dis-

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emption principle as well. MWRA Pet. App. 15a, 21a. But, since the opinion does not explain how *Garmon* preemption is "implicated" here, and since, so far as can be discerned, *Garmon* preemption is not implicated here, the discussion in text is confined to the ABC contractor's *Machinists* claim. *See also Brief of the United States as Amicus Curiae in Support of the Petitions for Certiorari* in Nos. 91-261 & 91-274, at 8 & n.6 (filing in the instant cases).

puted state action may be highly relevant in evaluating whether Congress would have considered such an action to be an unenvisioned interference with the "free play of economic forces" that Congress contemplated. *Id.* at 749-50 n.27. Put another way, the "scope, purport and impact of the state [action] may *not* be ignored." *New York Tel. Co. v. New York Dept. of Labor*, 440 U.S. 519, 532 n.21 (1979) (Stevens, J.) (emphasis added).[14]

Against this background, the question here is whether a state agency's decision to provide for a project labor agreement in the development of its own property is an impermissible interference with the "free play of economic forces" that Congress intended to govern construction industry labor relations.

2. *Application of the* Machinists *Preemption Principle to the Project Agreement*

The holding below rests on a fundamental misunderstanding of *Machinists* preemption. The court of appeals majority failed to grasp that MWRA's purchasing decision—far from being an interference with Congress' intended free play of construction industry economic forces—is a choice by a purchaser of construction services to take advantage of an option that Congress intentionally made available to such purchasers. Chief Judge Breyer, dissenting below, went to the heart of the matter when he stated:

> [W]hen the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them. [MWRA Pet. App. 35a.]

[14] Starting from these propositions, this Court has upheld against *Machinists* challenges a wide variety of state actions that concern labor matters, despite the substantial impacts of these state actions on the labor relations conduct of unions and employers operating under the NLRA. *See e.g., Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19-22 (1987); *Baker v. General Motors Corp.*, 478 U.S. 621, 634-38 (1986); *Metropolitan Life Ins. Co., supra; Belknap v. Hale*, 463 U.S. 491, 498-507 (1983); *New York Tel. Co. v. New York Dept. of Labor, supra.*

In enacting NLRA §§ 8(e) and 8(f), Congress did not impose any particular labor relations arrangements on the construction industry. Rather, Congress expressly expanded the options available to industry participants to advance their economic interests, as they assess those interests. By denying one option to public owner-developers that is available to private owner-developers, the decision below places a restriction on Congress' intended free play of economic forces.

a. *The Project Agreement and the Relevant Economic Forces*

MWRA and the BCTC each balanced costs and benefits to reach an outcome both consider economically beneficial. The Authority concluded that the long-term stability and predictability that the Project Agreement promised would more than offset any potential economic losses attributable to the Agreement. For its part, the Council concluded that the benefits of the Agreement justified foregoing, for the full term of the Project, the rights to strike and picket granted by the Act. There is no ground to distinguish the economic forces that operated here from those that operate elsewhere in the construction industry.

First, the Project Agreement serves important economic interests of the Authority recognized by Congress as fully legitimate. Specifically, the Agreement provides the Authority with legally enforceable assurances of long-term labor stability on a projectwide basis. *See* pp. 5-8, *supra*. This Court has acknowledged that such arrangements, by "prohibit[ing] the subcontracting of jobsite work to nonunion firms," serve the "legitimate purpose" of reducing

the possibility of labor strife. *Woelke & Romero Framing Co. v. NLRB*, 456 U.S. 645, 662 & n.14 (1982).

Second, the scope and effects of these arrangements are narrowly tailored to confine their impact to the Boston Harbor Project. Thus, the Project Agreement *only* governs construction work performed on this Project. And the Agreement specifies that *all* contractors shall remain eligible to compete for project work, regardless of their labor practices elsewhere, as long as the contractor agrees to conform to the Agreement's practices *while performing work on this Project*. *See* p. 8, *supra*.

Third, the Authority's decision in favor of the Project Agreement imposes no pressures whatsoever on any contractor, subcontractor, or employee, other than the pressures commonly imposed on such parties when engaged on private projects that are governed by analogous, clearly lawful, arrangements. In discussing the very constraints that project labor arrangements impose on construction industry contractors and subcontractors—indeed, the very constraints that the ABC contractors complain of in this case—this Court has made clear that such "pressures" are "implicit in the construction industry proviso" of NLRA § 8(e) and thus consistent with Congress' intended plan. *Jim McNeff v. Todd*, 461 U.S. 260, 270 n.9 (1983). *See also Woelke & Romero*, 456 U.S. at 663 & n.11.

b. *The Statutory Text And the Court Below's Reading Of That Text.*

The court of appeals deemed all of these factors "irrelevant to the preemption issue at hand" because of a unique and mistaken construction of the term "employer" as used in the Act. MWRA Pet. App. 24a. Specifically, the court below pointed out that both NLRA §§ 8(e) and 8(f) use the term "employer" in delineating the class of contracts preserved by those sections from the Act's otherwise applicable prohibitions. *See* 29 U.S.C. § 158(e) (referring to agreements "between a labor organization and an employer in the construction industry"); 29 U.S.C. § 158(f) (referring to agreements entered into by "an employer engaged primarily in the building and construction industry"). The term "employer" is, moreover, defined in NLRA § 2(2) to exclude *inter alia* "any State or political subdivision thereof." 29 U.S.C. § 152(2). And, from this, the majority below inferred that Congress intended to deny to the states alone, when developing their own property, the construction industry arrangements referred to in §§ 8(e) and 8(f). MWRA Pet. App. 20a-21a, 24a-25a.

The inference the court of appeals drew from the statutory language of a congressional desire to *decrease* the options available to public owners and developers of property—while leaving a broader range of options available to private owners and developers—is unwarranted. The NLRA, fairly read, points in exactly the opposite direction.

First, the Act *nowhere* expressly prohibits a state or local government from engaging in any particular transaction. Rather, *all* of the NLRA's express prohibitions are directed at an "employer" or a "labor organization." *See* NLRA §§ 8(a) & 8(b). That fact strongly suggests that state proprietary actions—such as the Authority's here—do not run afoul of the Act. And the limited nature of the Act's prohibitions fully explains why Congress used the term "employer" in §§ 8(e) and 8(f). As Chief Judge Breyer explained:

> [T]he obvious reason is that the list of forbidden practices, to which the exceptions [in NLRA §§ 8(e) and 8(f)] apply, itself applies only to an "employer," defined to exclude "any State" . . . . A drafter, writing a statutory exception to the resulting prohibition[s], would not normally extend its scope beyond those subject to the prohibition[s], in the first place. [MWRA Pet. App. 41a.]

There was, then, no reason for Congress to exempt the states from a rule to which the states were not subject in the first place.

Second, in focusing on the fact that the MWRA is not an "employer," the court of appeals ignored the fact that the Authority is not purporting to act as one; nor does the legal validity of its actions depend on the Authority being an "employer." The Project Agreement is a collective bargaining agreement between Kaiser—undeniably an "employer" for purposes of § 8(f) and the construction industry proviso of § 8(e)—and the BCTC. Accordingly, the NLRB General Counsel found the Agreement to be valid under those provisions. *See Building & Trades Council*, NLRB Case No. 1-CE-71 (June 25, 1990) (reprinted at BCTC Pet. App. 83a).

The Authority in its turn is acting in its proprietary capacity *as a property owner purchasing construction services in order to develop its property.* Its role is no different from that often—and lawfully—played by private owners of construction projects who choose to have the construction services they purchase performed under a project labor agreement in order to further their economic interests. *See e.g., Morrison-Knudsen Co., Inc.*, 13 NLRB Advice Mem. Rep. ¶ 23,061 (March 27, 1986) (noting owner's insistence on a project labor agreement) (reprinted at BCTC Pet. App. 97a); D.Q. Mills, *Industrial Relations and Manpower in Construction, supra*, at 40 (project labor agreements "may involve the owner of the project as well as his contractors, or . . . may be sought by the [general] contractor at the owner's insistence"); *Labor Department Study, supra*, at 14 (project labor agreements developed out of needs of "contractors and owners"). *See generally*, pp. 13-15, *supra*.

The court of appeals apparently assumed that entities which are not "employers" within NLRA § 2(2) may

not utilize project labor agreements that have been negotiated pursuant to NLRA §§ 8(e) and (f), *even when acting as owners of property, rather than as employers.* That assumption leads to absurd results. For example, railroads and airlines are *not* "employers" under NLRA § 2(2), because that provision excludes from the "employer" definition "any person subject to the Railway Labor Act." 29 U.S.C. § 152(2). Yet no one could seriously contend that any source of law prohibits such businesses, when developing their own property through construction industry employers and employees, from insisting that their construction managers and contractors negotiate and adhere to lawful project labor agreements.

Third, the court of appeals was especially unwarranted in using NLRA § 2(2) as the basis for finding a congressional intent to limit the options available to the states. As this Court has recognized, the "employer" definition in § 2(2) constitutes a congressional judgment to provide an "exemption[] for States and their subdivisions" from "obligations imposed by Congress under the Commerce Clause." *Garcia*, 469 U.S. at 553 & n.16. Neither the court of appeals nor the ABC contractors have cited any authority supporting the notion that Congress intended that this express exemption of the states from obligations under the Act should *decrease* the states' freedom of action.

Fourth, the inference from § 2(2) drawn by the court below ignores the basic legal principle that, in the absence of any express indication of a congressional intent to preempt state actions, an inference of such intent is disfavored. *See* p. 21, *supra*. This principle normally operates to prevent the extension of a prohibition on private proprietary conduct to analogous public proprietary conduct. Yet here, the court below rushed headlong in the opposite direction, inferring an intent to *prohibit* public proprietary conduct from a provision that *lifts a prohibition* on analogous private conduct. Such a perverse

inference stands our basic concept of federalism on its head. *See* pp. 21-22, *supra*.

c. *The Relevant Legislative History*

The legislative history of NLRA §§ 8(e) and 8(f) provides no support for the premise that Congress intended public proprietors to be denied options available to their private counterparts. Instead, the legislative materials that discuss publicly-owned construction projects assume that the labor relations arrangements on such projects would be no different than the arrangements prevailing on privately-owned projects.

As this Court has stated, the 1959 Congress, in enacting §§ 8(e) and 8(f), was seeking "to preserve the *status quo* regarding agreements between unions and contractors in the construction industry." *Woelke & Romero*, 456 U.S. at 657; *see also id.* at 654-660 (reviewing legislative history). The proposed prohibition on "hot cargo agreements" that would become § 8(e) and the NLRB's prior invalidation of prehire agreements called the preexisting "pattern of collective bargaining in the construction industry" into question. *See* pp. 11-13, *supra*. Congress responded by enacting special construction industry rules "to ensure that [this preexisting pattern] remained lawful." 456 U.S. at 657. The collective bargaining arrangements Congress intended to preserve as options in the construction industry are therefore to be determined "by examining Congress' perceptions regarding the status quo in the construction industry" when it enacted these provisions. *Id.*

This Court has discovered those "perceptions" by looking at knowledgeable witnesses' descriptions of labor relations in the construction industry in the extensive congressional hearings preceding the enactment of §§ 8(e) and 8(f), as well as at secondary materials describing practices in the industry at the time. 456 U.S. at 657-660. An examination of those materials confirms that

Congress proceeded on the understanding that labor relations practices on construction projects did not differ depending on whether the project owner was a private entity or a public entity.

In the hearings, witnesses repeatedly described to Congress the collective bargaining arrangements they wished to preserve by giving examples from private and public projects interchangeably. Indeed, some witnesses went further, and stressed the costs of disrupting these prevailing patterns *on public projects*—where the public interest was most clearly implicated—in order to make their case for the proposed legislation.[15]

[15] *See, e.g., Hearings on S. 1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare*, 82nd Cong., 1st Sess. 31 (1951) (testimony of R. Gray, President of the BCTD) (arguing that if current collective bargaining patterns were disrupted, "[o]n a public building . . . the taxpayer would pay excessive costs" and the public injury "would be especially serious now, when the building and construction industry is engaged in vital emergency defense projects"); *id.* at 133 (testimony of R. Cole, Tile Contractors Ass'n. of America) (stressing need for prehire collective bargaining in hypothetical "$5,000,000 project out in the desert some place either for private industry or for the Government"); *id.* at 168 (testimony of G. Johnson, spokesman for the Guy F. Atkinson Co. and the Associated General Contractors of Calif.) (stressing that many projects "such as dams, powerhouses, tunnels, and the like . . . involve millions of dollars—usually of taxpayers' funds"); *id.* at 169 (stressing "that in the case of the major projects, the owner is usually the taxpayer"); *id.* at 175-176 (discussing projects owned by the Seattle Department of Public Works, the Atomic Energy Commission, and the Army Corps of Engineers); *Hearings on Proposed Revisions of the Labor-Management Relations Act of 1947 Before the Senate Comm. on Labor and Public Welfare*, 83d Cong., 1st Sess. 1302 (1953) (testimony of G. Johnson) (prehire contracting is needed "because of the practical operational conditions under which millions of dollars of Federal and State and local competitive-bidding jobs are carried on"); *id.* at 1304 (discussing California state project and extensive "Federal work . . . in . . . the construction of highways, roads, dams"); *id.* at 1342-43 (testimony of J.J. O'Donnell, President of National Constructors Ass'n.) (discussing large projects for "the Atomic Energy Commission, the Army Corps of Engi-

Other materials on the nature of construction industry labor relations confirm that the same kind of contractual arrangements—reflecting the same kind of economic forces—characterized public and private construction projects. "Among the first project agreements" were those for the Grand Coulee Dam, the Shasta Dam, many other major dams in the West, atomic energy facilities and defense installations. The earliest of these agreements date back to the 1930s and 1940s. *See Labor Department Study*, *supra*, at 14 (quoted in full in BCTC Pet., at 11). Indeed, the Labor Department Study noted that such agreements were often used on projects involving "a great deal of public interest and often public funds." *Id. See also* p. 14, *supra*.

The available legislative materials not only demonstrate that Congress understood that public and private construction projects involved the same array of economic forces and arrangements; those materials also demonstrate that Congress recognized that on public projects—like private projects—such arrangements often reflected the preferences and economic interests of the project's owners.

Thus, a memorandum circulated by Representatives Thompson and Udall on the provision that would become §8(f) noted that prehire contracting had, for efficiency reasons, "been encouraged by the Atomic Energy Commission and other government agencies" in the construction of their own facilities. 2 NLRB, *Legislative History of the Labor Management Reporting and Disclosure Act of 1959*, at 1578 (memo cited in *Woelke & Romero*, 456 U.S. at 662 n.13). And, the same point was made 7 years earlier in the Senate Report recommending passage of the Taft proposal upon which NLRA § 8(f) was ultimately based. *See* S. Rep. 1509, *supra*, at 3 (explaining that "[t]he United States Government, in addition to its interest in the general welfare

neers, the Army Chemical Corps, the Army Ordinance Department, the Department of the Navy, and General Services Administration").

and the vigor of the economy, is directly concerned in the proper pricing and completion of construction projects for defense installations and production facilities").[16]

C. The Decisions Relied On By The Court Below

The court of appeals reached its startling result by amalgamating two recent decisions of this Court, *Wisconsin Department of Industry v. Gould*, 475 U.S. 282 (1986) and *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986), with a pre-*Garmon* decision, *Guss v. Utah Labor Relations Commission*, 353 U.S. 1 (1957). Proceeding in this way, the majority below arrived at a *per se* rule that state action which "directly interfere[s] with the collective bargaining process" is always preempted, regardless of whether the action is proprietary or regulatory. MWRA Pet. App. 30a. This *per se* rule is inconsistent with this Court's preemption jurisprudence in general and finds no support in the cases upon which the court of appeals relied.

First, as explained in the margin, the court of appeals simply misread *Guss*.[17]

Second, neither *Gould* nor *Golden State* supports the majority below.

[16] This Report also illustrated the various "economic factors peculiar to the building and construction industry" with examples drawn from such public works projects as the construction of dams and defense installations. *Id.* at 3, 5. (For the connection between the Taft bill and § 8(f), see pp. 11-12 and nn.6 & 7, *supra*.)

[17] *Guss* involved the preemptive effect of one particular provision of the NLRA, § 10(a), 29 U.S.C. § 160(a), which grants the NLRB authority to enforce § 8's unfair labor practice provisions, and which also, in a proviso, grants the NLRB authority to enter agreements ceding to state agencies aspects of § 8 enforcement authority. The *Guss* Court held that a state labor board could not conduct unfair labor practice proceedings covering conduct within the NLRB's § 10(a) jurisdiction when the NLRB had declined to exercise its jurisdiction but had *not* entered into agreement ceding its authority to the state board. This narrow holding, anticipating *Garmon*, in no way suggests that the NLRA ousts all state actions relating to the collective bargaining process. *Compare* cases cited at note 14, *supra*.

1. *Gould*, contrary to the arguments of the ABC contractors and the conclusion of the court of appeals, did *not* involve truly proprietary conduct of a state. In contrast to the Authority's actions here, *Gould* involved a state's attempt to use its purchasing power *to regulate*. The Wisconsin statute before the Court barred any employer found by the NLRB to have violated the NLRA three times in a 5-year period from doing any business with the State. The *Gould* Court held that the debarment law conflicted with Congress' decision that the remedies administered by the NLRB be the exclusive remedies for NLRA unfair labor practices and that those remedies not include a debarment penalty. 475 U.S. at 286-87.

In reaching its conclusion, the Court did *not* declare that the proprietary nature of a state's interests and actions is irrelevant to preemption analysis. To the contrary, the Court rested its decision on its determination that Wisconsin was *not* motivated by—and was *not* serving—its proprietary interests. The State was instead acting only to further regulatory goals directly addressed by the NLRA. Wisconsin had admitted as much. *See id.* at 287 ("The State concedes, as we think it must, that the point of the statute is to deter labor law violations . . . . No other purpose could credibly be ascribed . . . .").

Because the Wisconsin debarment statute addressed employer conduct *unrelated* to the employer's performance of any contractual obligations to the State, and because the State's reason for doing so was to strengthen the NLRA's remedies and thereby deter NLRA violations as a general matter, Wisconsin's "debarment scheme [was] tantamount to regulation." *Id.* at 289.

The *Gould* Court stressed that it was "*not* say[ing] that state purchasing decisions may never be influenced by labor considerations." *Id.* at 291 (emphasis added). Moreover, the Court recognized that it was "*not* faced . . . with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs." *Id.* (emphasis added).

Here, not only can MWRA's actions "plausibly be defended as a legitimate response . . . to local economic needs," and not only are those needs manifestly the most obvious and rational explanation for the Authority's decision, but the district court explicitly found those needs to be the stimulus that provoked the Authority's response. *See* ——, *supra*.

2. a. On its facts, *Golden State* is inapposite. The *Golden State* Court held that the City of Los Angeles, acting in a *regulatory* capacity, was precluded from using the threat of not renewing Golden State's license to force the taxi company to settle its collective bargaining dispute with its employees' union. Reasoning from *Machinists*, the Court held that the City could not exercise its regulatory power of license nonrenewal to restrict Golden State's right to use lawful economic weapons in its dispute with its union. *See* 475 U.S. at 615-19.

In *Golden State*, then, the City wielded power that no mere purchaser of services has at his disposal. By forcing Golden State to choose between resisting its union's demands and entirely losing its right to do business with both private and public entities within the city limits, the City altered the market forces by which Congress intended such a labor dispute to be decided.

b. It is instructive to recast *Golden State*'s facts to make that case more analogous to this case. If the City of Los Angeles had purchased taxi services from Golden State to transport city employees, and the strike had succeeded in producing serious interruptions in the services the City had purchased, surely Los Angeles would have been free to advise Golden State that the City would take its business elsewhere unless satisfactory services were restored. No reasonable application of this Court's preemption decisions would command that Los Angeles continue to purchase Golden State's unsatisfactory services, even though the City's withdrawal of its business might well have a sig-

nificant impact on the collective bargaining between Golden State and its union. Were a court to force the City to continue its market relationship with Golden State—despite the unsatisfactory nature of Golden State's services—it would be the court, not the City, which would be overriding the economic forces which Congress intended should be given their play.

By the same token, any public purchaser of construction services deciding that its particular economic circumstances warrant a project labor agreement, may choose to do business only with construction contractors willing to enter into such an agreement. See —— *supra*. Confronted with such a purchaser, those contractors who do not normally enter such agreements, can alter their normal operating methods to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement. The NLRA contemplates that purchasers can bring just such economic pressures to bear and that construction contractors will respond by making just such choices.

* * * *

The decision below works a startling and unsupported inversion of usual principles of federalism, preemption, and national labor law. While private owner-developers are intended by the NLRA to be free to choose project labor agreements for their construction projects, state agencies alone are held to be foreclosed from that option—with potentially severe consequences for the progress of their work and for the interests of the people the agencies serve. Preemption is not lightly to be inferred. The court below made such an inference not to prevent a state agency from interfering with the operation of a federal statutory scheme, nor even to *extend* to a state agency the same federal regime applicable to all others, but to *deny* to a public agency the benefits the federal scheme extends to all others. The decision below errs not, as may often happen, by nudging congressional enactments or legal doctrines somewhat too far, but by abruptly and unaccountably standing them on their head.

CONCLUSION

For the above stated reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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